No. 18-1074

IN THE
Supreme Court of the United States

BRIAN PERRYMAN,
Petitioner,

v.

JOSUE ROMERO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court approved a class-action settlement under which (1) all class members who submitted claims will be "fully reimbursed for the money they lost," and (2) the unclaimed funds will be spent on "research that is directly responsive to the issues underlying this litigation," rather than on a costly additional distribution that would either "overcompensate claimants" or result in minuscule payments to non-claimants. Pet. App. 21a–23a.

The question presented is whether, on the facts of this case, the court of appeals correctly concluded that the district court did not abuse its discretion in finding that the settlement is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e).

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INTRODUCTION

The petitioner pitches this case as a replacement for *Frank v. Gaos*, 139 S. Ct. 1041 (2019), which this Court recently disposed of without addressing the question presented. He claims that this petition presents the "same issue" as *Frank*, is an "ideal vehicle for addressing the issue," and "should be granted for the same reasons that the petition was granted" in *Frank.* Pet. 1, 10.

He is wrong three times over. *Frank* involved what is known as a "*cy pres*-only" settlement. The settlement gave "more than $5 million to *cy pres* recipients, more than $2 million to class counsel, and no money to absent class members." *Frank*, 139 S. Ct. at 1043. This Court "granted certiorari to review whether such *cy pres* settlements satisfy" Rule 23. *Id.*; *see* Frank Br. i (question presented: the permissibility of a "settlement that provides a *cy pres* award of class action proceeds but no direct relief to class members"). The petitioner in *Frank* (who represents the petitioner here) likewise focused his merits brief on the *cy pres*-only nature of the settlement. *See* Frank Br. 20 (lead argument: "This *cy pres*-only settlement is not fair or reasonable under Rule 23(e) because it provides no direct or actual compensation to the class[.]").

This case is fundamentally different. Whereas the settlement in *Frank* "provided members of the class no damages and no other form of meaningful relief," 139 S. Ct. at 1047 (Thomas, J., dissenting), the settlement here "provide[s] class members with two forms of relief": each claimant will "be fully reimbursed for the money they lost," and "each class member will receive a $20 credit" to boot. Pet. App. 4a–5a, 22a. Thus, as multiple Justices have recognized, the question in this case—about the use of "*cy pres* as a mechanism to distribute unclaimed funds," *id.* at 21a—is meaningfully different from the one in *Frank*. *See*

139 S. Ct. at 1047 (Thomas, J., dissenting) (distinguishing between the use of *cy pres* "in disposing of unclaimed funds" and a "*cy pres*-only arrangement"); *Frank* Tr. 10 (Justice Sotomayor drawing the same distinction). Moreover, whereas *Frank* involved a large fee award for class counsel, the court below vacated the fee award in its entirety and remanded for recalculation—a fact that also underscores the interlocutory nature of this appeal.

So this petition does not in any way present the "same issue" as *Frank*. Indeed, the petitioner implicitly concedes as much by altering the question presented from *Frank* to say that the *cy pres* award—rather than the settlement *as a whole*—"provides no direct relief or benefit to class members." But that is tautological. And because the same question is not presented, it should go without saying that this case is not an "ideal vehicle" to replace *Frank*.

Nor should this petition be granted for the "same reasons" as *Frank*. *Id.* The petition in *Frank* was based on the settlement's *cy pres*-only nature, and it argued that the case thus implicated a circuit split. *See* Frank Cert.-Stage Reply 1 (emphasizing that the settlement "wipes out [class members'] claims and gives them nothing" while "class counsel get paid in full"—neither of which is true here). By contrast, no split is implicated by the settlement here, under which all claimants are fully reimbursed. The petition in *Frank* also noted that *cy pres*-only settlements have "waned in recent years," *id.* at 2, perhaps because of the Chief Justice's statement that, "[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J.). Unlike *Frank*, however, this case does not present an opportunity to "clarify the limits" of *cy pres*. It involves a garden-variety *cy pres* award correctly affirmed under abuse-of-discretion review. Certiorari is unwarranted.

STATEMENT

The underlying case. Each class member purchased items from Provide Commerce, an operator of online businesses selling flowers, chocolates, fruit baskets, and the like. Pet. App. 4a. At checkout, pop-up advertisements appeared on their screens saying that they'd receive $15 off another item from the same website as a "thank you" for their purchase. *Id.* at 28a. But instead of receiving the promised thank-you gift, the pop-up directed them to a different website operated by Regent Group, and in doing so automatically enrolled them in Provide's membership-rewards program. *Id.* at 4a. Provide then passed along their payment information to Regent, who charged a $1.95 activation fee and a recurring $14.95 monthly membership fee to each person until they cancelled. *Id.* at 4a–5a.

In 2009, four years after this scheme was devised, the named plaintiffs sued Provide and Regent on behalf of more than one million class members alleging violations of state and federal law. The parties spent the next few years engaged in hotly contested litigation. "Class counsel successfully opposed several dispositive motions in the case, amended the complaint multiple times to conform to discovery, took and defended numerous depositions . . ., propounded written discovery leading to defense production of 450,000 pages of discovery, issued 22 non-party document subpoenas, organized and coded over a million pages of documents, and participated in six settlement conferences." *Id.* at 76a–77a. During this time, Provide shuttered the program as a result of this case.[1]

[1] The petitioner asserts (at 3) that "Provide ceased the business practice when Congress outlawed it in 2010." That is incorrect: As the company admitted below, it actually changed the program months before Congress changed the law—and did so as a result of this case.

The settlement. The parties ultimately reached a settlement that produced a process in which every class member had approximately six months to submit a claim for a refund (which required them to affirm that they had not intended to enroll in the program and had not used the program benefits). *Id.* at 6a. Those who did so will be fully reimbursed for their out-of-pocket losses. Further, the settlement provides that each class member will receive a $20 credit by email to buy items from Provide's companies (which, contrary to the petitioner's assertion, can be used in conjunction with other, regularly available discounts). The idea behind including this credit was to replace the $15-off coupon that they had been promised but denied. *Id.* at 5a.

The settlement includes two other relevant provisions. It authorizes class counsel to seek up to $8.7 million in attorneys' fees from the defendants, subject to approval by the court. *Id.* And it provides that any unclaimed settlement funds will be distributed as a *cy pres* award to three universities, to be used on programs "regarding internet privacy or internet data security." *Id.*

The district court's approval of the settlement. The petitioner was the only class member out of 1.3 million to object to the settlement. CA9 ER316. He did so after submitting a claim entitling him to receive the full amount of his out-of-pocket damages ($110), on top of the $20 credit sent to him by email. CA9 ER658. He primarily objected to class counsel's fee request, but he also devoted some space at the back of his brief to the *cy pres* award.

The district court rejected the petitioner's arguments and found that the settlement is "fair, reasonable, and adequate" under Rule 23(e). As relevant here, the court thoroughly addressed his *cy pres* arguments. *See* Pet.

App. 41a–49a. It found that the use of *cy pres* in this case is "clearly tie[d]" to the plaintiffs' claims, thereby ensuring that they will receive some indirect benefit. *Id.* at 42a. The court also reviewed the record and found that the award does not create a "significant appearance of impropriety" simply because three of the twenty-two attorneys representing the parties in this case graduated from one of the three *cy pres* universities. *Id.* at 43a-44a. The court additionally found that the *cy pres* award "will have a nation-wide impact." *Id.* at 46a.

Finally, the court carefully considered (and rejected) the possibility of another distribution to claimants:

> The settlement already authorizes class members to recover the entirety of any unauthorized charges and further awards a $20 credit worth $5 more than the original "thank you gift" leading to Plaintiffs' claims. In this way, class members may recoup their losses while also receiving some additional benefit through the $20 credit. While class members who avail themselves of both forms of recovery have arguably been made whole by their recovery, silent class members would not benefit from a further distribution to the claimant class members. Silent class members will receive greater benefit from the remaining funds if they are [used] for the creation of internet privacy and security programs benefitting internet consumers such as themselves.

Id. at 48a–49a. The court thus approved the settlement in full, including the fee award.

The appeal. The court of appeals reversed in part and affirmed in part. It "vacate[d] the fee award because the district court failed to treat the credits as coupons under

the Class Action Fairness Act ('CAFA') when calculating that award." *Id.* at 4a. "On remand," the court of appeals directed, "the award should be recalculated in a manner that treats the $20 credits as coupons under CAFA." *Id.* at 20a. The court further explained that, "[b]ecause we hold that the fee award must be recalculated, we need not address Objector's separate argument that the settlement disproportionately benefits class counsel at the expense of the class." *Id.* As a result, neither the fee award nor this argument—which goes to the fairness of the settlement itself—is at issue in this interlocutory appeal.

The court of appeals also held that "it was not an abuse of discretion for the district court to approve the use of *cy pres* here or to approve these particular recipients." *Id.* Recognizing that *cy pres* can be used "as a mechanism to distribute unclaimed funds," the court of appeals held that the district court acted within its considerable discretion in approving the settlement here. *Id.* at 21a. The district court was "under no obligation to adopt a distribution approach that might overcompensate claimants, all of whom will already be fully reimbursed for the money they lost." *Id.* at 21a–22a. Nor was the district court required to distribute unclaimed funds "pro rata to nonclaimant class members." *Id.* at 22a. Even if this were "technically feasible," the court of appeals concluded, it would make no practical or economic sense to mandate more than one million individual $2 distributions to class members, "particularly once the costs of distribution are deducted." *Id.* As for the *cy pres* recipients, the court of appeals held that the district court did not abuse its discretion in finding their "nationwide reach sufficient" and in finding that the bare "alumni connections of three of the (many) involved attorneys did not impermissibly taint the selection process." *Id.* at 23a–24a.

REASONS FOR DENYING THE PETITION

I. This case is not a replacement vehicle for *Frank v. Gaos*.

A. The petitioner touts this petition as a replacement for *Frank*. He says that it presents the "same issue" as *Frank*; that it is an "ideal vehicle for addressing the issue"; and that it "should be granted for the same reasons that the petition was granted" in *Frank*. Pet. 1, 10.

The premise of this argument, of course, is that the petition actually presents the same issue as *Frank*. It does not. The question in *Frank* was "[w]hether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class-action proceeds but no direct relief to class members comports with [Rule 23(e)]." Frank Br. i. By its terms, that question concerned the propriety of a *cy pres*-only settlement—that is, a settlement that provides "no direct relief to class members." And this Court made the same point in its per curiam decision: Immediately after noting that the settlement "would distribute more than $5 million to *cy pres* recipients, more than $2 million to class counsel, and no money to absent class members," the Court said that it "granted certiorari to review whether such *cy pres* settlements satisfy the requirement that class settlements be 'fair, reasonable, and adequate.'" *Frank*, 139 S. Ct. at 1043 (quoting Fed. R. Civ. P. 23(e)(2)).

But this case does not present that question because it does not involve "such [a] settlement[]." *Id.* Whereas the settlement in *Frank* gave "no money to absent class members," *id.*, the settlement in this case ensures that *all* claimants will "be fully reimbursed for the money they lost," Pet. App. 22a, while also providing a $20 credit to every class member regardless of whether they submitted a claim. In contrast to *Frank*, therefore, this case involves

the use of "*cy pres* as a mechanism to distribute unclaimed funds," *id.* at 21a—not to displace class members' recoveries altogether (as in *Frank*). And whereas the settlement in *Frank* gave "more than $2 million to class counsel," 139 S. Ct. at 1043, the decision below gives nothing to class counsel: it vacated the entire fee award and remanded to the district court for recalculation (a remand that the petitioner himself asserts will "quite likely . . . substantially" reduce the award, Pet. i). Moreover, because the court of appeals held that "the fee award must be recalculated, [it did] not address [the petitioner's] separate argument that the settlement disproportionately benefits class counsel at the expense of the class." Pet. App. 20a. As a result, neither the fee award nor its potential relationship to the settlement's fairness is at issue in this interlocutory appeal.

The petitioner tries to obscure these differences by taking the question that was briefed in *Frank* and shifting around some of the language. So instead of formulating the question to be about the propriety of a "settlement that provides a *cy pres* award [of class-action proceeds] but no direct relief to class members," as Frank's merits brief did, the petitioner is forced to revise the question to focus on the propriety of "a *cy pres* award that provides no direct relief or benefit to class members." But that is tautological: *all cy pres* awards, by their very nature, provide no direct relief to class members. That the petitioner understood the need to make this revision is a tacit admission that the key plank of *Frank*—a settlement that provides no direct benefits to any of the absent class members—is missing here.

This is not a minor difference, but a fundamental one. As Justice Thomas wrote in his dissent in *Frank*, a "*cy*

pres-only arrangement" can raise serious questions about the fairness of the settlement and the adequacy of the representation (particularly when accompanied by large payments to class counsel and the named plaintiffs). *See* 139 S. Ct. at 1047; *see also id.* at 1048 ("[B]ecause the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, I would hold that the class action should not have been certified, and the settlement should not have been approved."). At the same time, Justice Thomas recognized that the "role *cy pres* may permissibly play in disposing of unclaimed or undistributable class funds"—the question at issue here—is a very different one, and one that necessarily turns on the facts and circumstances of the particular settlement in question. *Id.* at 1047. Other members of this Court have recognized the same. *See, e.g.*, *Frank* Tr. 10 (Justice Sotomayor: "This is a full *cy pres* award, meaning there's no direct benefit to the class. What about the residual *cy pres*? I thought in many instances, if a fund is created and the claimants are all paid off, there's some money left over, the residual *cy pres*, and that's given indirectly often."). So it is entirely possible to conclude that the district court in this case did not abuse its discretion in approving the settlement, and yet still be troubled by *cy pres*-only settlements of the sort at issue in *Frank*.

In short, this case is no replacement for *Frank*. The petition in *Frank* at least purported to give the Court an opportunity "to clarify the limits on the use" of *cy pres*. *See Marek*, 134 S. Ct. at 9 (Roberts, C.J.). This case doesn't. Far from being about the limits of *cy pres*, the decision below represents an ordinary application of it.

B. The petition includes a barrage of other attacks on *cy pres*—some on the device as a whole, some on its use in other cases, and some on its use in this particular case. For long stretches, the petition reads like a collection of every criticism that the petitioner has ever catalogued against a past *cy pres* award, regardless of whether this case has any connection to any of those sundry concerns. But these arguments are not certworthy, and this case would be an unsuitable vehicle to address them in any event.

Some examples: The petitioner urges this Court (at 18) to take this case to issue a categorical holding that *cy pres* "cannot be stretched to encompass Rule 23 class-action settlements" *at all*—even though no court anywhere has accepted such a stunningly broad argument. He then detours to complain (at 19–22) that settlements providing for coupons can generate "exaggerated fees" for class counsel—even though the court below *vacated* the fee award and "did not address [his] separate argument that the settlement disproportionately benefits class counsel at the expense of the class." Pet. App. 20a. Next, the petitioner goes out of his way to take a swipe at particular judges and their spouses (at 23–24)—even though there is no allegation that the district court here had any affiliation with any *cy pres* entity. The petitioner also asserts (at 24) that *cy pres* awards "infringe on the First Amendment rights of class members" and violate due process—even though he concedes that these arguments are waived (and class members had ample opportunity, in any event, to submit claims knowing what would happen if they didn't). Likewise waived is any argument based on his case-specific and incorrect suggestion that the award has no nexus to the claims because, in his view, this case isn't about "internet privacy" or "data security" (an utterly uncertworthy issue anyway). *See* Pet. 11, 12, 13, & 15.

II. This case does not implicate a circuit split.

The petitioner cites four cases (at 12–16) that he claims are in conflict with the decision below. He is mistaken. The same features of this case that distinguish it from *Frank* also make clear that it does not implicate a circuit split. Simply put, none of the cases cited by the petitioner involved a settlement (like this one) under which (1) all claimants would be "fully reimbursed for the money they lost" in a claims process whose adequacy is uncontested, (2) the unclaimed funds would be spent in a way that is "directly responsive" to the underlying issues, as provided in the settlement, and (3) an additional distribution would either "overcompensate claimants" or result in minuscule pro rata payments to non-claimants. Pet. App. 21a–23a.

Begin with *In re Baby Products Antitrust Litigation*, which the petitioner says (at 15) "rejected" the approach taken by the court of appeals below. 708 F.3d 163 (3d Cir. 2013). The Third Circuit actually did the opposite. It "join[ed] other courts of appeals"—including the court below—"in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury." *Id.* at 172 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819–20 (9th Cir. 2012)). The Third Circuit further noted that the "[c]ourts of appeals have approved *cy pres* distributions where all class members submitting claims have already been fully compensated for their damages by prior distributions"—as the court did below—and that courts have done so "because additional individual distributions would 'overcompensat[e] claimant class members at the

expense of absent class members.'" *Id.* at 176. The Third Circuit expressly "agree[d]" with this uniform rule. *Id.*

The decision below perfectly coheres with the Third Circuit's decision. The court of appeals did not require the district court "to adopt a distribution approach that might overcompensate claimants, all of whom will already be fully reimbursed for the money they lost"—the same rule embraced by the Third Circuit. Pet. App. 21a–22a. And although the Third Circuit ultimately remanded in *Baby Products*, it did so on grounds wholly inapplicable here. In that case, the settlement did not "fully compensat[e] all claimants," the district court "did not know the amount of compensation that [would] be distributed directly to the class," and the settlement created a highly "restrictive claims process" with a $5 cap on claims worth as much as 30 times that amount. 708 F.3d at 174–76. In this case, by stark contrast, all claimants will be "fully reimbursed" for their losses (and receive a $20 credit as well), the district court carefully considered all relevant claims information, and the petitioner "has not identified any flaws" in the claims-administration process. Pet. App. 21a–22a.

These aspects of this case also serve to distinguish it from *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). There, the Seventh Circuit invalidated a *cy pres* award of unclaimed settlement funds. But it did so for a highly case-specific reason: It found that the parties had "structure[d] the claims process with an eye toward discouraging the filing of claims" by establishing a "needlessly elaborate" and "burdensome claims process" that would result in no more than $5 per claimant. *Id.* at 782–83. Because "the claims process could have been simplified," the Seventh Circuit concluded that the appropriateness of the *cy pres*

award had "not been demonstrated" on the record before it. *Id.* at 784.

That factbound holding does not in any way diverge from the decision below. The petitioner does not take issue with any aspect of the claims process—much less press or preserve any argument that the process was somehow fatally defective, as it was in *Pearson*. And although he recognizes (at 13) that "broader notice" could have been given in *Pearson*, he does not contest the court of appeals' finding that he "has not identified any flaws in the notice procedure used in this case." Pet. App. 21a.[2]

Nor does the decision below create a split with the remaining two cases relied on by the petitioner. The Fifth

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[2] Straying further afield, the petitioner (at 13) tries to claim a "multi-dimensional" split with *Pearson* based on its attorneys'-fees holding, and by asserting that the *cy pres* award here "went to geographically-narrow awardees for purposes that had nothing to do with the underlying claims brought by the class." But the court below *vacated* the fee award, so any complaint about a hypothetical future fee is premature and not presented. And the court's factbound holding that the district court did not abuse its discretion by finding that the three *cy pres* organizations "have a nationwide reach sufficient to justify their receipt of the cy pres award" is manifestly uncertworthy. Pet. App. 23a. The petitioner has never advanced an argument based on the "purposes" of these organizations. As for his drive-by attack on the award's geographic scope, this issue too is uncertworthy. The *Pearson* court vacated the settlement for reasons unrelated to geographic scope, and the only other case on which the petitioner relies for a split on this issue held simply that a *cy pres* award must "relate[] directly to the injury alleged" and be "closely tailored to the interests of the class and the purposes of the underlying litigation." Pet. 14 (quoting *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1067 (8th Cir. 2015)). The court below applied the same rule to the facts before it—and concluded (correctly) that the district court did not abuse its discretion in finding that the award "is directly responsive to the issues underlying this litigation." Pet. App. 23a.

Circuit's decision in *Klier v. Elf Atochem North America, Inc.*, by its own terms, does not apply to this case. 658 F.3d 468 (5th Cir. 2011). There, the district court ordered a *cy pres* distribution of settlement funds that had been unclaimed by a subclass, but "not unclaimed by the class as a whole," as is the case here. *Id.* at 479. The court did so even though the settlement did not contemplate the use of *cy pres*. And the court did so even though claimants in the other subclass had suffered "serious personal injuries"—like "cancer, nerve damage, and a heart transplant"—and had been "far from full[y]" compensated, and even though it was conceded that they could've easily received another distribution consistent with the settlement. *Id.* at 477–78.

The Fifth Circuit reversed. It held that "the district court abused its discretion by ordering a *cy pres* distribution in the teeth of the bargained-for terms of the settlement agreement, which required residual funds to be distributed within the class." *Id.* at 471. But the court expressly cabined its holding to that context. Observing that the circuits "have necessarily taken case-specific approaches to the role of the federal district judge in the distribution of monies left unclaimed after administration of a class settlement," the Fifth Circuit emphasized that "[t]his is not a case where the settlement agreement itself provides that residual funds shall be distributed via *cy pres*." *Id.* at 476, 478. The court thus explained that its decision does not "implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution," *id.* at 478 n.29—the scenario presented here.

That statement alone is enough to distinguish Fifth Circuit's decision in *Klier* from the decision below. But the case is further distinguishable because it did not involve a

situation in which all claimants had been made whole. Far from it. So that case is miles from this one, where there was a generous notice period in which all class members were given the opportunity to submit claims for a full refund, and there is no allegation that the notice or claims form was deficient or unduly complicated in any way.

If anything, *Klier* demonstrates the correctness of the decision below. The members of the subclass that had the unclaimed funds had not been fully compensated. A pro rata distribution would have yielded about $69 per claimant, minus administration costs. And yet "[a]ll agree[d] that additional distributions to the members of [this subclass] were not economically viable." *Id.* at 480; *see also id.* at 477 ("That it was not feasible to distribute these funds to members of Subclass B is not disputed."). The pro rata distribution in this case would be about $2 per person as it now stands, minus administration costs. And these people have already declined to submit claims even when they would have reimbursed up to the full amount of their damages.

Finally, there is the Eighth Circuit's decision in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060. That case was about the propriety of making an additional distribution to claimants who had not already been "fully compensated by the settlement." *Id.* at 1066; *see id.* at 1064 (noting that lists of "class members who received and cashed prior distribution checks" would "form the basis of a further distribution to the classes"). Here, however, all claimants will be fully compensated. So that case does not speak to the question here. And even if it did, there would be no conflict. As the petitioner points out (at 13), the case says that the *cy pres* "inquiry must be based primarily on whether 'the amounts involved are too small to make

individual distributions economically viable.'" *See id.* at 1065. But that is exactly what the court below did. Although the petitioner tries to get mileage out of the court's statement that a pro rata distribution to non-claimants "might be technically feasible," Pet. App. 22a, plucking it out of context and quoting it five times over, there can be no doubt from the rest of the paragraph what the court was saying. And that's this: The economics are such that a second distribution would make no sense as a practical matter, even if it might be feasible as a technical matter. Or to use the language of the Eighth Circuit: "the amounts involved are too small to make individual distributions economically viable." *BankAmerica*, 775 F.3d at 1065.

The petitioner disagrees with the correctness of that conclusion (and he is wrong for reasons we're about to discuss). But there is no disagreement among the circuits on the legal framework, nor any split on the propriety of the *cy pres* award in this case.

III. The decision below is correct.

Finally, the court of appeals got it right: the district court did not abuse its discretion in finding that the settlement is "fair, reasonable, and adequate" under Rule 23(e). As the district court explained: The settlement "authorizes class members to recover the entirety of any unauthorized charges and further awards a $20 credit worth $5 more than the original 'thank you gift' leading to Plaintiffs' claims. In this way, class members may recoup their losses while also receiving some additional benefit through the $20 credit." Pet. App. 48a. Weighing the possibility of a further distribution, the court concluded that, "[w]hile class members who avail themselves of both forms of recovery have arguably been made whole by their

recovery, silent class members would not benefit from a further distribution to the claimant class members." *Id.* They would "receive greater benefit from the remaining funds if they are distributed" as *cy pres*. *Id.*

This is anything but an abuse of discretion. Class members here were given a generous time period during which they could submit claims for reimbursement. Those who availed themselves of that claims process (including the petitioner) will be fully reimbursed, and the petitioner has not preserved any argument to the contrary. As the court of appeals correctly concluded, nothing in Rule 23 requires district courts to "overcompensate claimants" rather than use the remaining funds in a way that will at least indirectly benefit non-claimants. Pet. App. 21a–22a. If anything, fairness would seem to require the opposite.

Nor does Rule 23(e) demand a pro rata distribution to non-claimants in this case, as the court below correctly concluded. *Id.* at 22a. These class members were given almost half a year to submit claims that would have reimbursed them for the full amount of their losses—which ended up being around $75 per claimant—and yet they did not do so. There is nothing in the record (nor in common sense) to suggest that they would have now gone through the trouble of taking the necessary steps to obtain only a dollar or two of compensation (after administrative costs were deducted). The district court was not required as a matter of law to insist on such a wasteful and time-consuming exercise—especially when each class member already received a credit worth more than what they had originally been promised (the $15 "thank you" coupon) and would also indirectly benefit from the *cy pres* award.

The petitioner's argument to the contrary is difficult to pin down. He says (at 16–17) that *cy pres* should be "flatly

prohibited" in class-action settlements, but he cites no authority for this proposition, and no case so holds. Rule 23's text makes no mention of this supposed prohibition. To the contrary, Rule 23(e)(2) requires only that a district court find that the settlement is "fair, reasonable, and adequate"—a "general[] . . . standard" that calls for a pragmatic balancing of "benefits and costs." *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 45 (1st Cir. 2005). Congress and the Rules Advisory Committee have repeatedly considered—and rejected—revisions to the law explicitly addressing *cy pres*. The petitioner's categorical position conflicts with this deliberate choice and the plain text of Rule 23. This Court "ha[s] no warrant to encumber [class-action] litigation by adopting an atextual requirement . . . that Congress, despite its extensive involvement in the . . . field, has not sanctioned." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013).

A more modest argument (such that the petitioner makes one) would fare no better. The circuits have settled on an approach allowing unclaimed settlement funds to go to *cy pres* if further distribution to the class would be unfair, impracticable, or involve amounts too small to be economically viable. The American Law Institute has endorsed the same approach. Am. Law. Inst., *Principles of the Law, Aggregate* Litigation § 3.07(c) (2010). This case comfortably falls into that category, and the petitioner barely attempts to show otherwise—much less show that the district court abused its discretion. In the petitioner's world, a district court should be precluded as a matter of law from approving a settlement that allows all claimants to be fully reimbursed, that gives a credit to every class member (claimant or non-claimant) for an amount that exceeds what they had originally been promised, and that

uses unclaimed funds for research that directly relates to the issues underlying the litigation. Nothing in the text, purpose, or structure of Rule 23 authorizes that senseless result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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